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Shareholder Demands For Higher Corporate Earnings Have Their Price: How Courts Allow Employers to Fire Older Employees For Their Achievements

I. INTRODUCTION

A recent California case has focused commentators' and lawyers' attention on a growing trend in labor law-the willingness of courts to allow employers to terminate older employees based on their higher earnings.¹ On July 25, 1997 in *Marks v. Loral Corporation*, the California Court of Appeal for the Fourth District cleared the way for employers to lay off older workers on the ground that their salaries are too high and stand in the way of the profitability of the corporation.² The court's ruling was the most recent in a string of cases around the country that found for the employers on the employees' charges of age discrimination.³ In so ruling, the court affirmed a lower court decision which stated that "[a]n employer is entitled to choose employees with lower salaries, even though this may result in choosing younger employees. If the choice is based on salary, there is no age discrimination."⁴ Writing for a unanimous court, presiding Justice Sills concluded that the federal case law and the plain language of the federal age discrimination statutes⁵ clearly support the notion that employers retain the right to terminate the employment of older employees merely because of their high salaries.⁶

The court also noted that the policy of the Age Discrimination in Employment Act of 1967 ("ADEA") only allowed such salary-based termination when the salary is not merely used "as a *pretext* or 'euphemism' for a decision *really* based on age."⁷ The court stated that "neither Congress nor the state Legislature ever

1. See *Marks v. Loral Corp.*, 68 Cal. Rptr. 2d 1, 23 (Cal. Ct. App. 1997).

2. See *id.* at 23-24.

3. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993); *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1209 (8th Cir. 1997); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125 (7th Cir. 1994);

4. *Marks*, 68 Cal. Rptr. 2d at 7.

5. See 29 U.S.C. §§ 621-634 (1998).

6. See *Marks*, 68 Cal. Rptr. 2d at 23-24.

7. *Id.* at 23 (emphasis added) (quoting *Metz v. Transit Mix Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987)).

intended the age discrimination laws to inhibit the very process by which a free market economy—decision-making on the basis of cost—is conducted and by which, ultimately, real jobs and wealth are created.”⁸

It is easy to see how a capitalistic view might have influenced the legal judgment of the three justices of the California Court of Appeal for the Fourth District.⁹ In today’s society, most decisions, no matter whether corporate or private, are ruled by the “bottom-line.” The stock market is driven by the earnings and earnings potential of each and every corporation. To increase their capital gains and dividends, shareholders put immense pressure on their board of directors to steadily increase the corporation’s net earnings.

In an age of worldwide competition, it is important for corporations to be able to make decisions that are in the best interest of the company and the shareholders, even if some of these decisions are not in the best interest of individual employees. The court’s solution in this case was to allow the employer to lay-off an older employee based on his higher income and cost to the corporation.¹⁰ A significant philosophical disagreement exists, however, regarding the best way to respond to this complex economical and social problem.¹¹

Opponents of discrimination based on wages assert that it will do more harm than good.¹² They maintain that if the legal system allows employers to terminate older employees based on salaries, then it gives employers “a clear roadmap on how to rid the workforce of older, higher-paid employees.”¹³ Labor lawyers assert that the salary-based discrimination approval in effect extinguishes the protections of the ADEA because employers could easily circumvent the statutes by increasing older employees’ salaries to the point where termination based on wages will receive the courts’ approval.¹⁴ Additionally, many commentators argue that there are other alternatives to terminating an employee simply because he earns more than a younger associate would. One such example would require employers to ask workers to take a pay cut prior to termination.¹⁵

Regardless of whether or not courts find salary-based discrimination to be a “reasonable factor” exception to the age discrimination laws, older employees

8. *Id.* at 24.

9. *See id.* Presiding Justice Sills wrote the unanimous opinion of the court with Justices Wallin and Rylaarsdam concurring. *See id.* at 24.

10. *See id.*

11. *See, e.g., Metz v. Transit Mix Inc.*, 828 F.2d 1202, 1211 (7th Cir. 1987) (holding that an employer subjected his employee to age discrimination when the employer terminated him and hired a younger, lower-paid replacement).

12. *See Michael Higgins, Success Has Its Price: Courts On Firing Older, Higher-Paid Workers to Save Money*, A.B.A. J., February 1998, at 34, 35.

13. *Id.*

14. *See generally Metz*, 828 F.2d 1202 (holding that an employers realization of salary savings after the employer’s replaced a high-paid older employee with a lower-paid younger employee “did not constitute a permissible, nondiscriminatory justification for a replacement.”).

15. *See, e.g., Stacey Crawshaw-Lewis, “Overpaid” Older Workers And The Age Discrimination In Employment Act*, 71 WASH. L. REV. 769, 780 (1996) [*hereinafter* Crawshaw-Lewis].

inevitably suffer the consequences of termination. It is self-evident that older employees do not have the same opportunities to seek new employment that younger people enjoy.¹⁶ Consequently, courts and the federal and state legislatures need to ensure that age is not a factor considered in *any* employer's decision to terminate.¹⁷

This Comment challenges the current trend in adopting salary-based discrimination of older employees in terms of the potential harmfulness to the age discrimination laws and the detrimental effects on older personnel. Part II discusses the historical background of the age discrimination laws and the ensuing impact in determining "reasonable factors" as relating to salary-based discrimination.¹⁸ Part III examines the reasoning why courts believe that age and salary are discernable and do not conflict.¹⁹ Additionally, Part III examines the modern trend in courts to allow salary-based discrimination of older employees.²⁰ Part IV analyses the modern trend to allow employers to terminate their higher paid older employees to see why the courts' policies have changed so dramatically over the past decade.²¹ In addition, Part IV will illustrate the problems associated with allowing salary-based discrimination.²² Part V will discuss several alternatives to discharging older employees based on higher wages.²³ Finally, this Comment concludes that if the goal is to protect older employees from age discrimination, the adoption of salary-based discrimination is the wrong approach because alternative strategies exist for decreasing cost to the corporation without laying off successful and dedicated older workers.²⁴

II. HISTORICAL BACKGROUND

Congress created the Age Discrimination in Employment Act of 1967 in the aftermath of Title VII of the Civil Rights Act of 1964 (Title VII).²⁵ During the debates in the House of Representatives and the Senate, various members wanted to see an anti-age discrimination provision included in the broad civil rights

16. See George J. Church, *Unmasking Age Bias*, 152 TIME MAG. 10, Sept. 7, 1998, at H3.

17. See 29 U.S.C. § 623 (1998).

18. See *infra* notes 25-98 and accompanying text.

19. See *infra* notes 99-151 and accompanying text.

20. See *infra* notes 99-151 and accompanying text.

21. See *infra* notes 152-68 and accompanying text.

22. See *infra* notes 152-68 and accompanying text.

23. See *infra* notes 169-205 and accompanying text.

24. See *infra* notes 206-08 and accompanying text.

25. See *infra* notes 26-34 and accompanying text.

statute.²⁶ The attempt to include this provision was fruitless, and in its place, Congress asked the Secretary of Labor to prepare a fact-finding study on the effects of age discrimination in employment, which led to the passage of the ADEA in 1967.²⁷

The ADEA makes it unlawful for an employer to discriminate against any applicant for employment or any current employee based on age in regards to compensation, terms, conditions, and privileges of employment.²⁸ The Act goes further by forbidding the “limit[ation], segregat[ion], or classif[ication]” of employees in any way that could “deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.”²⁹ But unlike Title VII which the ADEA closely mirrors,³⁰ the ADEA provides numerous exceptions to these general prohibitions.³¹ Employers remain free to discharge older employees for good cause³² and may continue a bona fide seniority system or benefit plan that is not intended to dodge the prohibitions of the Act.³³ Among the other exceptions, the most potent exclusion to the ADEA gives employers the freedom to discharge older employees “where the differentiation is based on reasonable factors other than age”³⁴

This rather open-ended definition has been the controversy of many legal battles related to salary.³⁵ Opponents argue that salary is not a sufficient reasonable factor because age and salary are so interrelated that salary-based discrimination constitutes age discrimination.³⁶ On the other hand, proponents disagree and point out that “[w]age discrimination is age discrimination only when wage depends directly on age, so that the use of one is a pretext for the other; high covariance is not sufficient, and employers always should be entitled to consider the relation between a particular employee’s wage and his productivity.”³⁷

26. See 110 CONG. REC. 2596-99, 9911-13, 13490-92 (1964), *reprinted in* U.S. Dep’t of Labor, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5, 5-14 (1965) [hereinafter “LABOR REPORT”], and in EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 19, 22 (1981) [hereinafter “LEGISLATIVE HISTORY”].

27. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 287, 316 (1964) (superseded by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 10, 86 Stat. 111, 132 (1972)); see also Civil Rights Act of 1964, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1998)).

28. See 29 U.S.C. § 623(a)(1) (1998).

29. 29 U.S.C. § 623(a)(2).

30. Compare 29 U.S.C. § 623(a) with 42 U.S.C. § 2000e-2(a) (1998) (enumerating unlawful and discriminatory employer practices).

31. See 29 U.S.C. § 623(f).

32. See 29 U.S.C. § 623(f)(3).

33. See 29 U.S.C. § 623(f)(2)(A)-(B).

34. See 29 U.S.C. § 623(f)(1).

35. See generally Don R. Sampen, *Age Discrimination and Reasonable Non-Age Factors*, 24 J.C. & U.L. 1 (Summer 1997) (discussing the history of the ADEA and highlighting several important cases resulting from the statute’s promulgation) [hereinafter Sampen].

36. See *Metz v. Transit Mix Inc.*, 828 F.2d 1202, 1207 (7th Cir. 1987).

37. *Id.* at 1212 (Easterbrook, J., dissenting).

By enacting the ADEA, Congress intended to discourage the stereotyping of older workers as less productive and more expensive than their younger counterparts.³⁸ Due to the similarities between Title VII and the ADEA, it is not surprising that courts have used a Title VII analysis in ADEA cases.³⁹ Under both statutes, courts first determine, in cases of disparate treatment,⁴⁰ whether there is any direct evidence of intent to discriminate.⁴¹ If such evidence cannot be found, then courts apply the *McDonnell Douglas*⁴²/*Burdine*⁴³ burden shifting approach.⁴⁴ Under this test, courts determine whether they can find any inference of intentional discrimination.⁴⁵ Most cases involving salary-based termination are analyzed under this three part test.⁴⁶ First, the plaintiff must satisfy the initial burden of showing the *prima facie* elements of the claim.⁴⁷ Second, the burden of production then shifts to the defendant to offer a "legitimate, non-discriminatory reason" for the action.⁴⁸ Finally, the plaintiff has an opportunity to show that the employer's given reason

38. See LABOR REPORT, *supra* note 26, at 5 (concluding that age discrimination existed but was the result of stereotypes about older workers rather than from intolerance or animus), *reprinted in* LEGISLATIVE HISTORY, *supra* note 26, at 22. Representative Burke remarked that "[age discrimination] arises . . . because of assumptions that are made about the effects of age on performance." 113 CONG. REC. 34, 742, *reprinted in* LEGISLATIVE HISTORY, *supra* note 26, at 153. Henceforth, "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

39. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). "There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived in *haec verba* from Title VII." *Id.*

40. See *EEOC v. Frances W. Parker Sch.*, 41 F.3d 1073, 1076 (7th Cir. 1994). "Disparate treatment occurs when an employee is treated less favorably simply because of race, color, sex, national origin, or in our case, age. This is the most obvious form of discrimination. To be successful on this type of claim, proof of discriminatory motive is critical." *Id.* at 1076.

41. See *Teamsters v. United States*, 431 U.S. 324, 358, n.44 (1977).

42. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (creating a three-step burden shifting test to evaluate circumstantial evidence of intentional discrimination).

43. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1973) (explaining that the second step of the *McDonnell Douglas* test shifts the burden of production to the defendant who must then show a legitimate, non-discriminatory reason for the adverse employment action).

44. See Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1222 (1981) [hereinafter "*Burdens*"].

45. See *Bush v. Dictaphone Corp.*, 161 F.3d 363, 369-70 (6th Cir. 1998) (reiterating that the initial burden of production requires only an inference of a discriminatory adverse employment action).

46. See, e.g., *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1205-06 (8th Cir. 1997); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1122 (7th Cir. 1994); *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1421-22 (10th Cir. 1991).

47. See *Walker v. Mortham*, 158 F.3d 1177, 1183 (11th Cir. 1998) (citing *McDonnell Douglas*, 411 U.S. at 802).

48. See *id.* at 1184 (citing *Burdine*, 450 U.S. at 253).

is merely pretextual.⁴⁹ To show pretext, the employee must offer additional evidence of discriminatory intent or show that the reason proffered by the employer is false.⁵⁰ If the plaintiff successfully offers such evidence, the court may grant judgment for the plaintiff as a matter of law.⁵¹

Besides the disparate treatment theory, some plaintiffs have effectively asserted claims based on a mixed motives theory of age discrimination.⁵²

Even though a set burden-shifting framework applies in age discrimination cases, courts have continued to struggle with the concept of a “reasonable factor” that allows an employer to avoid liability for age discrimination.⁵³ For many years, courts considered salary to be so closely linked to age that they found age discrimination.⁵⁴ The rationale was that older employees needed to be protected from younger, cheaper labor.⁵⁵ Courts argued that in most instances long-term employment and age could not be separated because the older employees received a higher salary in view of their long service and continued employment for the particular employer.⁵⁶ For example, the court in *Dace v. ACF Indus., Inc.*⁵⁷ found that a close relationship exists between tenure status and age.⁵⁸ The court held that the possibility existed that the employer plainly intended to eliminate older employees because the employees had, through years of satisfactory service, built up higher salaries than their younger counterparts.⁵⁹ The court determined that “[i]f

49. See *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 919-20 (7th Cir. 1996). “Pretext means more than a mistake on the part of the employer; pretext ‘means a lie, specifically a phony reason for some action.’” *Id.* at 919 (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)).

50. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993); *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804-05.

51. See *Hicks*, 509 U.S. at 511.

52. See, e.g., *Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076 (7th Cir. 1994). For a detailed discussion of the mixed motives theory, see Howard Eglit, *The Age Discrimination in Employment Act, Title VII, And The Civil Rights Act Of 1991: Three Acts And A Dog That Didn’t Bark*, 39 WAYNE L. REV. 1093 (1993) [hereinafter *Mixed Motives Theory*].

53. See Sampen, *supra* note 35, at 1. Sampen discusses various forms of “reasonable factors” that provide a legitimate basis for employment decisions. See *id.* For example, employers may terminate their workers based on diminished physical or mental capacity, which sometimes diminish with age. *Id.* at 32 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991)). Sampen emphasizes that the targeted factors should be addressed “without any reference to the employee’s age” if possible, or should “be addressed indirectly through other non-age factors.” See *id.* at 34.

54. See, e.g., *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1211 (7th Cir. 1987) (holding that controlling cost, though important to the employer, cannot result in age discrimination by replacing an older, more expensive employee with a younger, less expensive one); *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 378 (8th Cir. 1983) (holding that the plaintiff’s demotion could reasonably be found by a jury to be the product of age discrimination); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1168 (8th Cir. 1985).

55. See *Metz*, 828 F.2d at 1209.

56. See *Dace*, 722 F.2d at 378.

57. *Id.* at 374.

58. See *id.* at 378.

59. See *id.*

the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated."⁶⁰

The court in *Leftwich v. Harris-Stowe State College*⁶¹ explained that "[i]n enacting the ADEA, Congress was plainly concerned about unemployment among older workers and the difficulty they encounter in obtaining or retaining employment."⁶² The National Commission for Employment Policy attributed the inability of older employees to find comparable work to the worker's development of firm-specific skills that are not easily transferable to another job setting.⁶³ Consequently, while the older employee's higher wages reflect his "value of improved skills and the increased productivity that results, it is also indicative of one of the very problems the ADEA was intended to address: the likelihood that the employee will be less employable in other settings."⁶⁴ The Eighth Circuit found that the express purpose of the ADEA was to "to promote employment of older persons based on their ability rather than age"⁶⁵ and "to prohibit arbitrary age discrimination in employment."⁶⁶ In accordance with its understanding of the legislative intent behind the ADEA, the *Leftwich* court found a close relationship between the plaintiff professor's tenure, his comparatively higher salary and his age.⁶⁷ In unison with other federal courts at the time, the *Leftwich* justices held that monetary savings resulting from the discharge of older employees could not serve as a genuine reason under the ADEA for an employment selection criterion.⁶⁸

Similarly to *Leftwich*, the court in *EEOC v. Chrysler Corp.*⁶⁹ held in the same year that Chrysler Corporation's forced layoffs of several older employees due to economic reasons violated the ADEA.⁷⁰ The Court of Appeals agreed with the district court and found that the defendant Chrysler Corporation in fact experienced

60. *Id.* (quoting *Leftwich v. Harris Stowe State College*, 702 F.2d 686, 691 (8th Cir. 1983).

61. 702 F.2d 686 (8th Cir. 1983).

62. *Id.* at 691.

63. National Commission for Employment Policy, 9th Annual Report, Rep. No. 17, *Older Workers: Prospects, Problems and Policies* 4 (1985).

64. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1205 (7th Cir. 1987).

65. H.R. REP. NO. 90-805, reprinted in 1967 U.S.C.C.A.N. 2213, 2213-20.

66. 29 U.S.C. § 621 (1998).

67. See *Leftwich*, 702 F.2d at 691.

68. See *id.* at 692; see also, e.g., *Geller v. Markham*, 635 F.2d 1027, 1034 (2nd Dist. 1980); *Laugeson v. Anaconda Co.*, 510 F.2d 307, 316-17 (6th Cir. 1975); *Marshall v. Arlene Knitwear*, 454 F. Supp. 715, 728 (E.D.N.Y. 1978). The *Leftwich* court quoted the court in *Marshall*: "Where economic savings and expectation of longer future service are directly related to an employee's age, it is a violation of the ADEA to discharge the employee for those reasons." *Leftwich*, 702 F.2d at 692 (quoting *Marshall*, 454 F. Supp. at 728).

69. 733 F.2d 1183, 1185 (6th Cir. 1983).

70. See *id.* at 1185.

serious financial turmoil.⁷¹ But regardless of its monetary difficulties, Chrysler did not have the right to force older employees into early retirement.⁷² The court reasoned that Chrysler's program to force certain employees to retire early did not meet the least-detrimental-alternative standard applied.⁷³ Under its approach, "Chrysler would have had to give the employees subject to forced early retirements the same right of recall as the younger employees were given."⁷⁴ Further, the *Chrysler* court found that Chrysler failed to present sufficient evidence showing why "the need to implement a reduction in work force precluded a certain class of employees—employees age 55 or over with at least 10 years of service—from choosing layoff."⁷⁵ Accordingly, the court held that Chrysler Corporation violated the ADEA by forcing older employees into retirement while giving younger, less well paid workers the possibility of recall.⁷⁶ The court found that the salary factor was so closely intertwined with the age factor that Chrysler committed age discrimination.⁷⁷

The Court of Appeals for the Seventh Circuit decided another well known wage-based age discrimination case in 1987.⁷⁸ In *Metz v. Transit Mix, Inc.*,⁷⁹ the defendant concrete company terminated its 54-year-old plant manager Wayne Metz after 27 years of service to replace him with a younger, lower-paid substitution.⁸⁰ The trial court concluded that Metz's high pay made him fair game for discharge and entered judgment for Transit Mix, Inc.⁸¹ In a two to one decision, the Seventh Circuit reversed.⁸² The court failed to find evidence of Metz's poor performance.⁸³ Instead, the majority determined that the plant's poor performance was due to bad economic conditions and a decline in the local construction business.⁸⁴ The court ruled that Congress intended the ADEA to shield older employees from losing their employment through no fault of their own at a time in their lives when they are

71. *See id.* at 1186.

72. *See id.*

73. *See id.* The court explained that "[f]orced early retirements based on economic necessity are unacceptable under the ADEA unless they meet two tests. First, the necessity for drastic cost reduction obviously must be real." *Id.* Second, the least-detrimental-alternative standard must be satisfied. *See id.*

74. *Id.*

75. *Id.*

76. *See id.* at 1187.

77. *See id.* at 1186.

78. *See Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987).

79. *Id.*

80. *See id.* at 1203-04. At the time of Metz's layoff in December 1983, he was paid an hourly salary of \$15.75. *See id.* at 1203. Metz's 43-year-old replacement only received an hourly wage of \$8.05. *See id.* at 1204.

81. *See id.* at 1204-05.

82. *See id.* at 1211.

83. *See id.* at 1203, n. 2.

84. *See id.* at 1204.

most vulnerable.⁸⁵ Further, the court did not agree with the district court which adopted the following statement of the law: "The relatively higher cost of employing older workers as a group is generally rejected as an RFOA [reasonable factor other than age]. The cost of employing an older worker when considered on an individual basis, however, may constitute an RFOA."⁸⁶ The court believed that neither the ADEA nor the relevant case law supported this distinction.⁸⁷ Rather, the court found that allowing Metz's employer to terminate Metz, given the correlation between Metz's higher salary and his years of satisfactory service, would overcome the objective of the ADEA.⁸⁸

Judge Easterbrook disagreed with the majority in *Metz* and wrote a comprehensive dissent clarifying his opinion.⁸⁹ Judge Easterbrook explained that the age discrimination laws did not protect older workers from the harshness and reality of the job market.⁹⁰ He believed that it is the employer's right to terminate all employees based on actual performance, no matter whether young or old.⁹¹ The judge wrote in his dissent that "[t]he Act prohibits adverse personnel actions based on myths, stereotypes, and group averages, as well as lackadaisical decisions in which employers use age as a proxy for something that matters (such as gumption) without troubling to decide employee-by-employee who can still do the work and who can't."⁹² Henceforth, older workers are only protected from prejudice, not from economically based decisions to lay off higher paid employees.⁹³ If an employee's performance is no longer what is needed or demanded, the employer should have the right to make personnel changes in his business.⁹⁴ In making these important business decisions, the employer should be free to base his evaluation on the relations between performance and earnings.⁹⁵ In applying his thoughts of the law to *Metz*, Judge Easterbrook concluded that Transit Mix, Inc. did not subject Wayne Metz to age discrimination.⁹⁶ Rather, Transit Mix, Inc. terminated Metz's

85. See *id.* at 1205-07. The court quoted Willie Loman, the lead character of Arthur Miller's *Death of a Salesman*, when he was suddenly fired after 34 years of employment: "You can't eat the orange and throw the peel away—a man is not a piece of fruit!" *Id.* at 1205, n. 6 (quoting A. MILLER, *DEATH OF A SALESMAN*, at 82 (1949)).

86. *Id.* at 1206 (quoting B. Schlei & P. Grossman, *Employment Discrimination Law*, at 506 (2nd ed. 1983)).

87. See *id.*

88. See *id.* at 1207.

89. See *id.* at 1211-22 (Easterbrook, J., dissenting).

90. See *id.* at 1212 (Easterbrook, J., dissenting).

91. See *id.* at 1213 (Easterbrook, J., dissenting).

92. *Id.* (Easterbrook, J., dissenting).

93. See *id.* (Easterbrook, J., dissenting).

94. See *id.* (Easterbrook, J., dissenting).

95. See *id.* (Easterbrook, J., dissenting).

96. See *id.* at 1215 (Easterbrook, J., dissenting).

employment solely based on cost-effectiveness.⁹⁷ Judge Easterbrook based his reasoning on Metz's failure to show causation as well as his failure to demonstrate that Transit Mix, Inc. acted with discriminatory intent.⁹⁸

III. MODERN HOLDINGS AND TREND

Since *Metz*, an increasing number of the circuit courts have agreed with Judge Easterbrook's dissent and ruled that salary-based discrimination against older employees falls under the reasonable factors exception of the ADEA.⁹⁹ The issue eventually split the circuit courts¹⁰⁰ who believed that age and salary were in fact separate and discernable,¹⁰¹ and argued that choosing younger, cheaper employees over older, established and higher salaried employees is acceptable as long as the decision is based on salary alone.¹⁰² In 1993, the United States Supreme Court took up a key age discrimination case, *Hazen Paper Co. v. Biggins*.¹⁰³

In *Hazen Paper*, the employer fired 62-year-old technical director Walter Biggins a few weeks before he would qualify to receive pension benefits.¹⁰⁴ In a unanimous opinion, the Court ruled that even if the company's motive was to save money, they did not violate the ADEA in doing so and, accordingly, had the legal right to terminate Biggins' employment.¹⁰⁵ The Court clarified its views on disparate treatment by finding that if the employer's motivating factor for terminating an employee is based upon a factor other than the employee's age, then there cannot be an ADEA violation.¹⁰⁶ The Supreme Court reiterated that in a disparate treatment claim¹⁰⁷ "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision" and influenced the

97. See *id.* at 1212 (Easterbrook, J., dissenting).

98. See *id.* at 1221 (Easterbrook, J., dissenting).

99. See 29 U.S.C. § 623(f)(1); see generally Higgins, *supra* note 12, at 34; see also 29 U.S.C. § 623(f)(1) (listing lawful practices under the ADEA).

100. See *Marks v. Loral Corp.*, 68 Cal. Rptr. 2d 1, 8 (Cal. Ct. App. 1997); Higgins, *supra* note 12, at 34.

101. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993).

102. See *Marks*, 68 Cal. Rptr. 2d at 66.

103. 507 U.S. 604.

104. See *id.* at 606-07.

105. See *id.* at 612. The Court said that "[w]e do not mean to suggest that an employer lawfully could fire an employee in order to prevent his pension benefits from vesting But it would not, without more, violate the ADEA." *Id.* The Court further stated that even though the ADEA is not violated, terminating the employee at such a time could violate the federal Employee Retirement Income Security Act ("ERISA"). See *id.*

106. See *id.* at 609.

107. The Court explained that:

[d]isparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Id. (citation omitted) (construing Title VII of Civil Rights Act of 1964).

outcome.¹⁰⁸ The Court reasoned that when the employer's determination is solely based on factors other than age, the problem of erroneous and stigmatizing stereotypes vanishes.¹⁰⁹ "This is true even if the motivating factor is correlated with age, as pension status [in this case] typically is."¹¹⁰ But even though a correlation can be found between years of service and age, they are analytically different, and an employer can take one into account while disregarding the other.¹¹¹ Consequently, the Supreme Court applied its findings to the case at bar.¹¹² It held that Hazen Paper Company's decision to lay off Walter Biggins did not violate the ADEA because the Company's sole motivation was to save money by not letting Biggins' pension benefits vest, not Biggins' age.¹¹³

Since the Supreme Court ruled in *Hazen Paper*, courts have been inclined to side with employers who fire older, higher paid employees in order to cut costs.¹¹⁴ In 1994, the Seventh Circuit Court of Appeals re-examined the issue in *Anderson v. Baxter Healthcare Corp.*¹¹⁵ In *Anderson*, the defendant Baxter Healthcare Corporation fired a 51-year-old maintenance worker after becoming the highest-paid hourly worker in the facility.¹¹⁶ The plaintiff claimed that his salary-based termination constituted improper age discrimination.¹¹⁷ The Circuit Court pointed to the Supreme Court's findings in *Hazen Paper* and agreed that a correlation can exist between an employee's earnings and his age, but explained that the correlation was "not perfect."¹¹⁸ Accordingly, the court found that Baxter Healthcare Corporation had not partaken in age discrimination when it fired the plaintiff because of his high salary "[b]ecause age and . . . [compensation levels] are analytically distinct, [and] an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on . . . compensation level is necessarily 'age-based.'"¹¹⁹

The Eighth Circuit revisited the issue of wage based termination in 1995.¹²⁰ In *Bialas v. Greyhound Lines, Inc.*,¹²¹ the defendant Greyhound Lines, Inc.

108. *Id.* at 610; see also *Crawshaw-Lewis*, *supra* note 15, at 782-85 (analyzing age discrimination cases).

109. See 507 U.S. at 611.

110. *Id.*

111. See *id.*

112. See *id.* at 611-12.

113. See *id.*

114. See *supra* notes 115-147 and accompanying text.

115. 13 F.3d 1120 (7th Cir. 1994).

116. See *id.* at 1121.

117. See *id.* at 1125.

118. *Id.* at 1126.

119. *Id.* (quoting *Hazen Paper*, 507 U.S. at 611).

120. See *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759 (8th Cir. 1995).

121. *Id.*

terminated several older employees in a reduction in force due to financial struggles.¹²² The employees filed an age discrimination law suit against Greyhound, alleging that Greyhound's motivation was to rid the company of the older, higher paid employees to hire younger, cheaper labor.¹²³ The court determined in accordance with *Hazen Paper* that there was no necessary inference that the employer based its termination on age as the sole motivating factor.¹²⁴ Accordingly, the court gave its approval to the salary-based termination of the employees.¹²⁵

In October 1997, the Eighth Circuit Court of Appeals based in St. Louis heard the case of forty-nine-year-old Karen Snow in *Snow v. Ridgeview Medical Center*.¹²⁶ The laid-off laboratory technician claimed that she had been the victim of her own high salary after working for the company for twenty-nine years.¹²⁷ The court affirmed the summary judgment for the employer.¹²⁸ The court reasoned that "[u]nder *Hazen Paper*, the evidence in the instant case is insufficient, as a matter of law, to show that Snow's termination was based upon her age."¹²⁹ The court did not find sufficient evidence to indicate that age rather than salary was the determining factor in Snow's layoff.¹³⁰

The California Court of Appeal's decision in *Marks v. Loral Corporation*¹³¹ demonstrates the recent tilt of wage discrimination law against employees.¹³² For years, Michael Marks served as a well-respected member of Ford Aerospace's corporate finance staff.¹³³ When Loral Corporation bought Ford Aerospace Corporation in 1990, the newly created Loral Aerospace retained Marks in its corporate finance unit of the corporation.¹³⁴ Unfortunately for Marks, the company decided in 1992 to close down the corporate finance department and to relocate all of its members to different positions within Loral.¹³⁵ Instead of relocating Marks within the company's seven other locations, however, Loral Aerospace determined that it was no longer feasible to pay Marks' high salary—a reward for years of

122. See *id.* at 761.

123. See *id.* at 761-63.

124. See *id.* at 763.

125. See *id.*

126. 128 F.3d 1201, 1205.

127. See *id.* at 1207-08. Snow asserted in her deposition that she was terminated because she was the "senior most employee [at Ridgeview Medical Center (RMC)], making good money." *Id.* at 1208 (quoting Snow Deposition at 81). Snow in essence claimed that "she was terminated because she had been employed at RMC longer than the other then-current employees, and thus earned a comparatively higher salary." *Id.*

128. See *id.* at 1209.

129. *Id.* at 1208.

130. See *id.*

131. 68 Cal. Rptr. 2d 1 (Cal. Ct. App.).

132. See *supra* notes 103-130 and accompanying notes.

133. See *Marks*, 68 Cal. Rptr. 2d at 1.

134. See *id.* at 2.

135. See *id.*

success, dedicated service and faithful commitment to the corporation.¹³⁶ In fact, Loral Aerospace realized that Marks was earning a substantially higher salary than his younger associates in the department and consequently terminated Marks' employment to cut down its costs and increase shareholder profitability.¹³⁷

Forty-nine-year-old Michael Marks filed a state and federal age discrimination law suit against Loral Corporation for terminating him in violation of the ADEA.¹³⁸ To Marks' surprise, the California courts agreed with many other courts around the country, holding that a high salary is sufficient grounds to terminate an employee even if the applicable state and federal age discrimination laws would otherwise protect him.¹³⁹ Consequently, the California Court of Appeal for the Fourth District decided in 1997 that Loral Corporation did not infringe on any age discrimination laws by firing forty-nine-year-old Michael Marks because of his high salary, merely in order to increase the corporation's bottom line income.¹⁴⁰ The court based its reasoning on Judge Easterbrook's dissent in *Metz v. Transit Mix Inc.*¹⁴¹ and quoted extensively from it.¹⁴² Henceforth, the court agreed with Judge Easterbrook who commented in his dissent in *Metz* that "wages correspond precisely to the costs of doing business, and hence to profitability."¹⁴³ The court also felt that unlike age discrimination, "[s]alary differentials . . . present a matter qualitatively different from the usual disparate impact situation in a Title VII context. An action based on price differentials represents the very quintessence of a legitimate business decision."¹⁴⁴ The court in *Marks* adopted the proposition that "[c]ost-based layoffs often constitute perfectly rational business practices, grounded in employers' concern for economic viability."¹⁴⁵ Henceforth, a court cannot find an ADEA age discrimination where the motivating factor of the firing comes within the "reasonable factors other than age" language of the federal age discrimination statute, and a salary-based termination does constitute such a reasonable factor.¹⁴⁶ In a nutshell, the California court agreed with recent federal

136. See *id.*

137. See *id.* at 7.

138. See *id.* at 2.

139. See *id.* at 23-24.

140. See *id.* at 24.

141. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1211 (7th Cir. 1987).

142. See *Marks*, 68 Cal. Rptr. 2d at 1; *Metz*, 828 F.2d at 1211-22 (Easterbrook, J., dissenting).

143. *Marks*, 68 Cal. Rptr. 2d at 10 (quoting *Metz*, 828 F.2d at 1219 (Easterbrook, J., dissenting)).

144. *Id.* Judge Gary Taylor wrote in *E.E.O.C. v. Newport Mesa Unif. Sch. Dist.*, 893 F. Supp. 927, 932 (C.D.Cal.1995): "In a for-profit enterprise the essence of employment decisions is whether an employee's salary is justified by that employee's productivity."

145. *Marks*, 68 Cal. Rptr. 2d at 10 (quoting Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 Wis. L. REV. 507, 510 (1995) [hereinafter Sloan]).

146. See *id.*; see also 29 U.S.C. § 623(f)(1).

court decisions that allow employers to terminate older employees solely based on their wages, thereby adopting compensation as a “reasonable factor other than age.”¹⁴⁷

Over the last few years, courts have increasingly been asked to decide between protecting older workers and safeguarding the employers’ capability to cut overhead.¹⁴⁸ As the number of older employees continues to increase, the prospect of the courts to opt for the employers is — to the say the least — bleak.¹⁴⁹ Many commentators fear that salary-based termination creates a free-for-all for employers to discharge their older employees not based on “age,” but on the “higher salary” the employees have rightfully earned by dedicating their work lives to the employer.¹⁵⁰ Have these decisions abrogated the protections set forth by the Age Discrimination in Employment Act of 1967¹⁵¹ which prohibits age based discrimination. Why have the courts turned on seemingly defenseless older employees?

IV. ANALYSIS OF MODERN TREND

The modern trend in federal courts is clearly to allow employers to terminate older employees based on higher wages.¹⁵² The courts base their decisions on the assumption that the correlation between age and salary does not truly exist and is merely stereotypical.¹⁵³ It is exactly that sort of stereotype Congress sought to eliminate when it enacted the ADEA in 1967.¹⁵⁴ The age discrimination statutes sought to “prevent employers from assuming that merely because an individual

147. *See id.*

148. *See supra* notes 103-130 and accompanying notes.

149. *See Higgins, supra* note 13, at 34. According to a Statistical Abstract of the United States by the U.S. Bureau of Labor Statistics, the number of older employees is expected to continue to increase over the next seven years. *See id.* Whereas 31.9 million civilian labors over the age of 45 worked in 1980, the number has increased to 35.2 million in 1990, and to 40.9 million in 1995. *See id.* The number of older workers is projected to increase to 48.6 million in the year 2000 and to 56.9 million in 2005. *See id.*

150. *See id.* at 35.

151. *See* 29 U.S.C. §§ 621-634 (1998).

152. *See supra* notes 103-130 and accompanying notes.

153. *See Marks v. Loral Corporation*, 68 Cal. Rptr. 2d 1, 10-11 (4th Dist. 1997).

154. *See EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). The Supreme Court explained that Congress’ primary reason for enacting the ADEA was the termination of employment on the basis of inaccurate and stigmatizing stereotypes. *See id.* at 231-32. The Report of the Secretary of Labor, prepared to aid Congress prior to the enactment of the ADEA, had come, among others, to the following basic conclusions:

Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.

Id. at 231.

attained a certain age, he no longer could do the job, or do it as well."¹⁵⁵ But the age discrimination statutes did not provide an all-inclusive protection for aging employees either.¹⁵⁶ Attaining a certain age does not give an aging employee absolute protection under the ADEA.¹⁵⁷ If the employee, for example, is unproductive, is no longer fit to work his job, or is less qualified than a younger prospect, then the older employee cannot expect the statutes to protect his job.¹⁵⁸

Along the same lines, the ADEA specifically states that it is not unlawful to make an adverse employment decision based "on reasonable factors other than age."¹⁵⁹ Employers' lawyers have therefore made the argument — and modern courts agree for the most part — that in a free market economy employers should be free to lay off higher paid employees if the need arises to cut costs.¹⁶⁰ Courts realize that even though there is a correlation between compensation, years of service and age, that correlation is "not perfect."¹⁶¹ The court in *Anderson v. Baxter*¹⁶² concluded that "[a] younger worker who has spent his entire career with the same employer may earn a higher salary than an older worker who has recently been hired by the same employer."¹⁶³ Consequently, courts feel that a person's salary level and his age are so analytically distinct that an employer can make a termination decision based on one—salary—without considering the other—age.¹⁶⁴ Further, courts have held that it is important for employers to keep the right to discriminate against employees on the basis of salary because it "goes to the very core of the operation of a market economy."¹⁶⁵ The legal system should not stand in a company's way to determine its own fate and best interest by exercising the power to be cost-effective and reduce expenses where necessary.¹⁶⁶ Accordingly,

155. See Marks, 68 Cal. Rptr. 2d at 8.

156. See generally *Hazen Paper Company v. Biggins*, 507 U.S. 604, 611-12 (1993).

157. See *id.*

158. See *id.* at 611.

159. 29 U.S.C. § 623 (1998).

160. See *supra* notes 103-130 and accompanying notes.

161. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1126 (7th Cir. 1994).

162. *Id.* at 1120.

163. *Id.* at 1126.

164. See *id.*

165. Marks v. Loral Corporation, 68 Cal. Rptr. 2d 1, 10 (4th Dist. 1997); see also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, fn. 59 and 60 (1940) (holding that the ban on price fixing is because of the "actual or potential threat to the central nervous system of the economy").

166. See Marks, 68 Cal. Rptr. 2d at 10. The court explained:

All pricing, of course, results in 'discrimination.' Buyers 'discriminate' against Brand X when they purchase the cheaper Brand Y because Brand Y is cheaper. Compensation levels are nothing more than the price of individual services in the labor market. Prices, both in terms of what is paid for and what is received, go to the very core of operating any enterprise, be it profit, nonprofit, or governmental.

Id.

courts give employers the freedom to make their own financial decisions by allowing them to fire expensive employees.¹⁶⁷ The court does not restrict this freedom by limiting it to only younger employees but extends it to older employees as well.¹⁶⁸

V. PROBLEMS AND ALTERNATIVES

But although modern corporations have reason to cheer about the courts' decisions to protect the free economic system, and praise the courts' capitalistic views, most employees do not share the optimistic vision of the courts.¹⁶⁹ As the majority of the court feared in *Metz v. Transit Mix, Inc.*,¹⁷⁰ many employees, commentators and labor lawyers also dread that allowing discrimination based on salary leaves employers holding all the cards.¹⁷¹ As a recent magazine article noted, "[w]hat would stop unscrupulous employers from simply paying older employees a bit more than other workers, then firing them on economic grounds?"¹⁷² This simple question makes clear the potential threat salary-based discrimination poses.¹⁷³ Employers are now given the tool to terminate older employees without having to worry about any adverse consequences on the side of the fired employees.¹⁷⁴

But doesn't this wage discrimination of older employees do exactly what Congress sought to eradicate by adopting the ADEA?¹⁷⁵ Salary-based firings subject every single older employee to the threat of termination, and provide less job security.¹⁷⁶ One widely held view is that the age discrimination laws were partly enacted to protect older employees as a class because older workers face distinctive impediments late in their careers.¹⁷⁷ It is self-evident that older employees are less marketable due to their age and the bias that still exists against

167. *See id.*

168. *See id.*

169. *See Higgins, supra* note 12, at 34.

170. 828 F.2d 1202, 1210 (7th Cir. 1987).

171. *See id.* at 1210. Circuit Judge Cudahy wrote in the 2-1 decision: "Through its control over productivity per wage dollar, the management would effectively decide who could be terminated as its employees reach a relatively advanced age." *Id.*

172. Higgins, *supra* note 12, at 35; *see generally* Michael Useem, *Business Restructuring and the Aging Workforce* (discussing the weight of economic factors such as business downturns in downsizing decisions), in *Aging and Competition: Rebuilding the U.S. Workforce* 33, 35-38 (James Auerbach & Joyce Welsh eds., 1994).

173. *See Higgins, supra* note 12, at 34-35.

174. *See id.*

175. *See supra* note 154.

176. *See Crawshaw-Lewis, supra* note 15, at 788.

177. *See Marks v. Loral Corporation*, 68 Cal. Rptr. 2d 1, 8-9 (4th Dist. 1997); *see also* Sloan, *supra* note 145, at 521. Sloan said that "the law's stated purpose of protecting older workers . . . [is] the ADEA's stated policy goal of protecting workers from the obstacles they face competing in the labor market late in their careers." *Id.*

them.¹⁷⁸ For example, in a yet unpublished study, the American Association of Retired Persons ("AARP") sent out pairs of testers, one fifty-seven years old and the other thirty-two years old, to study the pervasiveness of age bias in the job market.¹⁷⁹ The testers applied for 102 entry-level sales or management positions.¹⁸⁰ Even though the testers presented identical qualifications, the older applicants received less favorable responses 41.2% of the time.¹⁸¹ In addition, three-quarters of those results occurred before the older applicants had even been granted an interview.¹⁸² Thus, when compared to their younger equals, older employees already face a much tougher hiring process.¹⁸³ Accordingly, the courts' decisions to allow wage based terminations of older employees is nothing less than a dagger in the back of older workers who have given their entire lives to companies that no longer appreciate paying the higher salaries connected with the service they have been receiving.¹⁸⁴ Instead of giving employers seemingly unlimited powers to terminate older employees, the courts should reconsider their holding of salary as a reasonable factor.¹⁸⁵ Courts err when they claim that age, years of service and salary are "analytically distinct."¹⁸⁶ An increased salary comes from years of committed service, to a company; without the years of service, an employee can hardly expect to receive a higher salary. Therefore, it becomes clear that a person's age and his salary are so interrelated that they become almost inseparable. Accordingly, the courts should not view salary as a reasonable factor exception to the age discrimination laws; instead, courts should treat salary discrimination as yet another form of age discrimination.

178. See Steven J. Kaminshine, *The Cost Of Older Workers, Disparate Impact, And The Age Discrimination In Employment Act*, 42 FLA. L. REV. 229, 257 [hereinafter Kaminshine] (stating that proponents of a certain view of age discrimination statute "would point . . . to indications that the Act was passed, in part, out of concern that unemployed older workers face unique obstacles in finding employment late in their careers."); see also V. Jane Knox et al., *The Age Group Evaluation and Description (AGED) Inventory: A New Instrument for Assessing Stereotypes of and Attitudes Towards Age Groups*, 40 INT'L J. AGING & HUM. DEV. 31, 35-44 (1995) (proposing a new assessment tool to measure attitudes and stereotypes about age and reporting that perceived vitality and positiveness decrease with age); Mary Kite & Blair Johnson, *Attitudes Towards Older and Younger Adults: A Meta-Analysis*, 3 PSYCHOL. & AGING 233, 240 (1988) (finding relatively negative attitudes toward older employees, particularly regarding their competence).

179. See Church, *supra* note 16, at H3.

180. See *id.*

181. See *id.*

182. See *id.*

183. See *id.*

184. See Crawshaw-Lewis, *supra* note 15, at 769 (criticizing the failure of the courts to adequately test the salary justifications proffered by employers to determine whether the salary justification was a legitimate, non-discriminatory reason for the action).

185. See 29 U.S.C. § 623(f)(1).

186. See *Hazen Paper Company v. Biggins*, 507 U.S. 604, 611 (1993).

Courts may also adopt one of several options to combat wage discrimination of older employees.¹⁸⁷ If an employer's motive for the termination of an older employee was truly his higher salary and not his age, then the employer should give his employee the option of taking a pay-cut.¹⁸⁸ This option would ensure that the termination is wage based rather than age based because the employee is the one making the final decision.¹⁸⁹ On one hand, the employee then has the choice of taking the pay cut and remaining employed, or, on the other hand, accepting the consequences of his unwillingness to compromise his salary.¹⁹⁰ In *Marks v. Loral Corporation*,¹⁹¹ for example, the plaintiff was willing to take a pay cut to remain in the job.¹⁹² However, some commentators believe that the pay-cut option is not realistic because pay-cuts leave the employees resentful and unwilling to continue to give their all to their employer.¹⁹³

Another option would require employers to transfer the targeted employees to other available positions elsewhere in the company.¹⁹⁴ Such a duty would prevent employers from abusing the right to terminate based on high salary; instead, employers would have the obligation to transfer the employee to another available position in the company.¹⁹⁵ This option will, however, not be workable in a one location company and would leave those employees in the same helpless position.

Some people believe that employers could avoid the wage discrimination dilemma by allowing employers to implement an "up or out" policy without second-guessing by the courts.¹⁹⁶ Employers would be able to terminate at-will employees as they saw fit, without any of the statutory or judicial protections

187. See, e.g., Peter Harris, *Age Discrimination, Wages and Economics: What Judicial Standard?* 13 HARV. J.L. & PUB. POL'Y 715, 756 (1990) ("[O]lder workers must be given a 'right of first refusal' on their jobs at the level of compensation determined by economic considerations . . . so long as their jobs continue to exist and they are qualified to perform them.") [*hereinafter* Harris]; Crawshaw-Lewis, *supra* note 15, at 790 (proposing that employers must consider wage reductions or other cost-cutting measures instead of terminations and should consider productivity losses when calculating salary savings). Further, the California legislature could reevaluate the *Marks* decision and provide a broader protection against age discrimination. For instance, the California legislature debated several bills after the *Marks* decision but none of them found adequate support. See Daniel B. Wood, *California May Clarify Murky Age-Bias Law Bills Would Challenge A Recent Court Ruling, Which Allows Firms To Fire Older Workers To Cut Salary Costs*, CHRISTIAN SCI. MONITOR, Mar. 4, 1998, at 3, 3.

188. See Harris, *supra* note 187, at 756.

189. See *id.*

190. See *id.*

191. 68 Cal. Rptr. 2d 1, 5 (Cal. Ct. App. 1997).

192. See *id.* at 23, n. 32.

193. See Karen Mishra et al., *Preserving Employee Morale During Downsizing*, SLOAN MGMT. REV., Jan. 1, 1998, at 83 (citing several research studies indicating that employees become resentful and withdrawn from their employers after undergoing downsizing efforts).

194. See *Marks*, 68 Cal. Rptr. 2d at 5. There currently is no such legal duty to transfer an employee to prevent a lay-off. See *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1118 (6th Cir. 1980) (directing the verdict for the employer since there is no legal duty to transfer a plaintiff to another plant and discharge the younger employee).

195. See *Marks*, 68 Cal. Rptr. 2d at 5.

196. See Higgins, *supra* note 12, at 35.

currently afforded.¹⁹⁷ The strong notion of at-will employment in this country would support such a policy.¹⁹⁸ Without the statutory and legislative exceptions to the at-will employment doctrine, however, this policy would favor the employers to such a great extent that it would eliminate merely *all* protections for the employees.¹⁹⁹ Were employers given such broad rights, the ADEA as well as Title VII would soon be powerless because employees would be unable to challenge their terminations in court; such an alternative could prove to be the downfall of employee rights.

Some advocates for older workers suggest that laws should force companies to act against their best financial interest and keep older workers employed.²⁰⁰ Since this approach would only cover wage discrimination, it seems to be the most workable and employee friendly approach. The older employee could feel more secure about his workplace and would not have to worry about losing his job without cause. The employer on the other hand would only suffer a minimal financial setback and would have the opportunity to reward the older employee for his years of dedicated service and commitment.²⁰¹

Thus, the least likely but most preferable approach would be to reverse the modern trend and to once again protect older employees from discharge. There clearly is a correlation between age and salary, and courts should not be able to disregard this correlation as analytically distinct.²⁰² Older employees deserve the protection of the laws as much—or more—than anyone else in this country.²⁰³ Furthermore, laws should not allow employers to use the employees until they feel that they can find someone younger. Because salary is so directly related to age, courts should take a second look at the impact of their decisions and admit their

197. See Ann McGinley, *Rethinking Civil Rights And Employment At Will: Toward A Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1449 (1996) (discussing current problems with employment discharge policy and proposing legislative reforms).

198. See, e.g., CAL. LAB. CODE § 2922 (West 1998) (setting forth the legality of termination at will upon notice).

199. See McGinley, *supra* note 197, at 1443, 1459-62.

200. See Higgins, *supra* note 12, at 35. "For example, even if a company thought its customers would prefer to deal with a younger sales staff, it could not refuse to hire salespeople over age 40." *Id.*

201. Even though this alternative seems fair as applied to both employer and employee, it is somewhat in conflict with the economic theory of capitalism. "Capitalism" is defined as "an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision, and by prices, production, and the distribution of goods that are determined mainly by competition in a free market." WEBSTER'S NEW COLLEGIATE DICTIONARY 169 (10th ed. 1997). By prohibiting employers from terminating older employees earning a higher salary, financial resources are potentially not used in the most efficient fashion, and competition may be slightly inhibited.

202. See *supra* note 186.

203. See 29 U.S.C. §§ 621-634 (1998).

mistakes.

It is clear that Congress designed the ADEA to protect older employees from discrimination, and such discrimination is not avoided by using salary as the determining factor.²⁰⁴ Many older employees must fear for their jobs because younger, more aggressive workers seek their jobs, and, sadly enough, companies are willing to trade the loyalty of older employees for the freshness and determination of younger applicants.²⁰⁵

VI. CONCLUSION

As the California Court of Appeals noted in *Marks*,²⁰⁶ the “image of some newly-minted whippersnapper MBA who tries to increase corporate profits—and his or her own compensation . . .” by tossing aside older workers “is not a pretty one.”²⁰⁷ After years of committed service to their employers, workers deserve to “grow old in peace” without having to fear for their jobs on a daily basis. Congress enacted the ADEA to protect older workers from age discrimination. Courts have failed to act in accordance with that intent by allowing salary-based discrimination and somehow finding that age and salary are analytically distinct. If courts are unwilling to enforce the ADEA on this matter, then Congress should take up the issue once again. We all deserve to age with grace and with the comfort that our jobs will not be taken from us the day the first hairs turn gray. If courts do not reverse the modern trend of allowing salary-based terminations, then there is “nothing to look backward to with pride, [and] nothing to look forward to with hope.”²⁰⁸

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204. *See id.*; *see also* 29 U.S.C. § 623 (f)(1).

205. *See, e.g.,* *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Snow v. Ridgeview Medical Center*, 128 F.3d 1201 (8th Cir. 1997); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994).

206. 68 Cal. Rptr. 2d 1, 24 (Cal. Ct. App. 1997).

207. *Id.*

208. *Id.* at 23-24 (quoting Robert Frost, *The Death Of The Hired Man*) (complete citation).